IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 14-2-2002
CORAM
THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM
C.R.P.No.529 of 2001 and C.R.P.Nos.530 of 2001 and
C.R.P.Nos.965, 1007,1343, 1535, 2371 & 2375 of 2001 and
CMP Nos.7277, 12667 & 12686 of 2001
1.M/s.Olam International Ltd,
rep.by its duly constituted
agent Gill & Co Ltd,
having its registered office at
No.9, Tamesek, Boulevard, 11-02,
Sun Tec Tower Two,
Singapore 038989.
2.Gill & Co. Ltd.,
rep.by its Managing Director
Kandhilal Virchand Shah
NTC House, Narottom
Moraje Marg,
Bellard Estate,Mumbai 406 538. .. Petitioners
in all CRPs

-vs-

Sri Sakthi Textiles Ltd.
475, Dr.Nanjappa Road,
Coimbatore. .. Respondent in
CRPs 529 & 530/2001

Sri Mahasakthi Mills Ltd,
No.475, Dr.Nanjappa Road,
Coimbatore. .. Respondent in
CRP 965 & 2375/2001

Sri Bhagavathi Textiles Ltd,
Coimbatore. .. Respondent in
CRP 1007 & 1343/2001

Kalaivani Spinners Ltd,
Coimbatore. .. Respondent in
CRP 1535 & 2371/2001

These civil revision petitions are preferred under S.115 of Code of Civil Procedure against the judgments dated 28.6.2000 of the learned I Additional District Judge-cum-Chief Judicial Magistrate, Coimbatore, made in C.M.A.Nos.96, 97, 98 and 101/99 and C.M.A.Nos.99, 100,102 and 103/99 confirming the orders of the learned II Additional Subordinate Judge, Coimbatore dated 7.7.1999 made in I.A.No.1334/98 in OS 675 /98, I.A.No.1341/98 in

OS No.663/98, I.A.No.1336/98 in OS 678/98, IA No.1338/98 in OS 681/98 and I.A.No.809/98 in OS 678/98, IA No.786/98 in OS 663/98, IA No.811/98 in OS 681/98 and IA No.807/98 in OS No.675 /98 respectively.

! For Petitioners : Mr.Mr.Irwin Aaron

^ For Respondents : Mr.T.R.Rajagopal,
Senior Counsel, for
Mr.T.R.Rajaraman

: ORDER

These revisions have arisen from the common judgment of the learned I Additional District Judge, Coimbatore, made in the abovesaid eight civil miscellaneous appeals confirming the orders of the learned II Additional Subordinate Judge, Coimbatore made in eight interlocutory applications.

2. C.M.A.Nos.96, 97, 98 and 101/99 have been preferred from the order of the learned Subordinate Judge dismissing the four interlocutory applications in IA 1334/98 in OS 675/98, IA 1341/98 in OS 663/98, IA 1336/98 in OS 678/98 and IA 1338/98 in OS 681/98, filed by the petitioners herein for stay of the trial of the said four suits filed by the respondents/plaintiffs, while CMA Nos.99, 100, 102 and 103/99 were preferred from the order of the learned Subordinate Judge made in another four interlocutory applications in IA 809/98 in OS 678/98, IA 78 6/98 in OS 663/98, IA 811/98 in OS 681/98 and IA 807/98 in OS 675/98, granting temporary injunction in favour of the plaintiffs, sought for in those applications. The respondents herein filed O.S.Naos.663/9 8, 675/98, 678/98 and 681/98 on the file of the II Additional Subordinate Judge, Coimbatore, seeking for declaration that the memorandum of settlement entered into between the plaintiffs and the second defendant in respect of the contracts between them did not subsist and for consequential permanent injunction restraining the defendants from treating the contracts as subsisting or making or enforcing any claim thereunder. In those suits, the respondents filed I.A.Nos.786, 807, 809 and 811/98 for interim injunction restraining the defendants from treating the contracts as subsisting or making or enforcing any claim thereunder pending disposal of the suits. On contest by the petitioners/defendants, those interlocutory applications were allowed by the trial court, granting the interim relief as asked for. The four civil miscellaneous appeals in CMAs 99, 100, 102 and 103/99, which arose therefrom were also dismissed confirming

the order of the trial court. Aggrieved defendants have brought forth the four civil revision petitions in CRPs 530, 965, 1007 and 1535 of 2001. The defendants filed four interlocutory applications in I.As. 1334, 1341, 1336 and 1338 /98 under Ss.8 and 45 of the Arbitration and Conciliation Act, 1996 and S.115 of the Code of Civil Procedure to stay the trial of the suits pending resolution of the disputes by the arbitration. On contest all those applications were dismissed. Aggrieved defendants preferred CMAs 96, 97, 98 and 101/99 as stated supra, which also met the same fate. Aggrieved over the same, the defendants have brought forth the other four CRPs 529, 1343, 2371 and 2375/2001. Since all the said revisions have culminated from a common judgment by the court below, on request by the learned counsel for both sides, all the revisions were heard together, and the following order shall govern all the revisions.

3. Arguing for the petitioners/defendants, the learned counsel Mr. Irwin Aaron would submit that the lower courts were not correct in dismissing the applications filed by the defendants seeking stay of all further proceedings in the suits pending resolution of the disputes by the arbitration, and in granting interim injunction in favour of the respondents/plaintiffs; that under S.45 of the Arbitration and Conciliation Act (Act 34/96), the jurisdiction of the civil courts were restricted to decide about the validity or otherwise of the arbitration agreement between the parties, and if the arbitration agreement was valid and the disputes raised in the suit were covered by the arbitration clause, the courts have no discretion but to refer the disputes to the arbitration; that it is pertinent to note that the memorandum of settlement dated 29.5.98 was to be treated as one arising out of the earlier contracts between the parties, and the said contracts contained an arbitration agreement to resolve all the disputes arising out of the contracts by arbitration; that the said agreement was not null and void or incapable of performance; that under such circumstances, the lower courts should have stayed the hearing of the suit and referred the parties to arbitration in terms and conditions of the sales contract between them; that the disputes raised by the respondents in the suit were covered by a valid arbitration agreement between the parties; that the said disputes were to be resolved by arbitration, as mutually agreed upon and when Section 45 of Act 34/96 is mandatory and makes it obligatory upon the court to pass an order staying the legal proceedings, commenced by a party to the agreement, the trial court was in error in dismissing the applications for stay, and the confirmation of the same by the appellate forum was also wrong; that it is not correct to state that the jurisdiction of the civil court could not be presumed to be taken away and the civil court alone can decide the dispute as to the validity or otherwise of the memorandum of settlement of contract, when Act 34/96 was a complete code by itself providing for all possible

contingencies and the jurisdiction of the civil courts were restricted and powers have also been conferred on the arbitration to decide all disputes inclusive of their own jurisdiction; that S.5 of Act 34/96 provides that in all matters governed by the said Act, no judicial authority shall intervene in the arbitral process except so provided in the Act, when particularly the arbitral proceedings were commenced in accordance with a valid and enforceable agreement to resolve the disputes between the parties, and hence the proceedings should have been stayed by the lower court; that under S.16 of the said Act, the arbitral tribunal was competent to rule on its own jurisdiction with respect to the existence and validity of the arbitration agreement, and can make a decision rejecting the plea of want of jurisdiction and can continue with its proceedings and pass an award, and the party if aggrieved by such an award could only take out an application for setting aside the award as provided under the Act; that it is pertinent to note that the objects and scheme of Act 34/96 was to achieve speedy settlement of disputes and minimizing the intervention of courts in the arbitral process; that when Section 4 5 of the Act was identical with S.3 of Foreign Awards (Recognition and Enforcement Act) of 19612, the lower court should not have relied on the judgment of the Hon'ble Supreme Court reported in AIR 1985 S.C. 1451, interpreting S.34 of Act 10/40 and holding that the disputes could not be decided by arbitration when particularly S.34 of Act 10/40 was not identical with S.45 of Act 34/96 bu t modeled in the UNCITRAL model law; that the Supreme Court of India while interpreting S.3 of the Foreign Awards Act in the latter part of the very same judgment, has held that there was nothing in the general law of arbitration either in English or Indian Law which prevents the arbitrators or an umpire from deciding the question of their own jurisdiction provisionally or technically and to proceed to make their awards on that basis, though it was clear that their provisional or tentative decision on questions of their own jurisdiction would be subject to the final determination by the Court; that the learned District Judge should not have confirmed the order of injunction granted by the trial court against the defendants from claiming relief under the sales contract when particularly the arbitral proceedings were commenced prior to the plaintiffs filing the suits; that under S.8(3) of the Act, an arbitral tribunal can continue with its proceedings and pass an award notwithstanding the pendency of the legal proceedings; that the trial court had no jurisdiction to pass an order of injunction and continue the suits when the arbitral tribunal has seized of the disputes under a valid agreement to resolve all the disputes inclusive of the disputes raised by the respondents in the suits by arbitration; that the order of injunction granted against the first petitioner was without jurisdiction, and the same was non-est in law; that the plaintiffs were not entitled to the relief claimed in the suits, much less an interim relief when it has not approached the court with clean hands on account of

its collusion with one of the employees of the defendants and manipulated the memorandum of cancellation of the contract and suppression of the initiation of the arbitration proceedings by the first petitioner prior to the institution of the suits when particularly the relief claimed in the suits were discretionary in nature; that when it was agreed between the parties that the forum of arbitration was Liverpool and the arbitration was governed by the bye-laws of the Liverpool Cotton Association Ltd, the courts in India have no jurisdiction to decide the disputes raised by the plaintiffs in the suits, and the orders passed by the lower court were liable to be set aside for want of jurisdiction; that in view of the plaintiffs relying on the award of the arbitral tribunal dated 8.12.1998 and filing the same into the court, the plaintiffs have waived its rights to raise objections, if any, for the arbitral tribunal proceedings with its proceedings irrespective of an order of injunction passed by the court, and hence the order of the learned District Judge confirming the order of the trial court has got to be set aside, and the applications filed by the petitioners for stay have to be allowed and the applications filed by the respondents/plaintiffs for interim injunction have got to be dismissed.

4. Countering to the above contentions of the petitioners' side, the learned Senior Counsel Mr.T.R.Rajagopal representing Mr.T.R. Rajaraman, for the respondents would submit that the trial court was perfectly correct in granting the order of temporary injunction in favour of the respondents restraining the petitioners-defendants from treating the contracts as subsisting or making or enforcing any claim thereunder pending disposal of the suits, and in dismissing the applications filed by the petitioners defendants for stay of the suits pending resolution of the disputes by the arbitration; that the plaintiffs companies to meet the cotton requirements of its mills for the year 1998 required to import cotton; that it had discussions with the Senior Manager of the defendants and finalised the same as to its requirements and price, and consequently, the second defendant gave its final offer for supply, which was accepted by the plaintiffs; that the contracts were signed by the plaintiffs and forwarded to the second defendant; that subsequent to the finalisation of the contracts, number of communications were exchanged between the plaintiffs and the second defendant who was acting as agent of the first defendant; that during the third week of May 1998, the plaintiffs contacted Mr.Subramaniam of the second defendant and expressed that the contracts could be settled at par in view of the worsening textile scenario; that the said Subramaniam, Senior Manager after consultation with the Directors of the second defendant, replied that the contracts could be cancelled if the plaintiffs paid 100/150 pts/lb; that after getting the confirmation from the plaintiffs, the said Subramaniam reverted back stating that the Directors of the second defendant had

secured the consent of the first defendant for effecting settlement, and consequently, on 29.5.98, the plaintiffs and the second defendant acting as the agent of the first defendant represented by its Senior Manager Mr.Subramaniam, executed a memorandum of settlement at Coimbatore agreeing and recording that the contracts entered into between the parties stood cancelled at par without any costs to either parties; that while the said contract was cancelled under the memorandum of settlement dated 29.5.98, ignoring the same, the second defendant addressed a reminder to the plaintiffs to open a letter of credit in respect of the contracts already cancelled; that the plaintiffs drew the attention of the second defendant to the memorandum of settlement already executed; that the contention of the defendants that there was total lack of knowledge about the memorandum of settlement and lack of authority to the said Subramaniam to execute such a settlement, was only an after thought; that it is pertinent to note that the second defendant had all along acted on behalf of the first defendant, and the first defendant has also allowed the second defendant to be represented by the second defendant all along, and thus, the first defendant was estopped from denying the authority of the second defendant; that it remains to be stated that the Senior Manager Mr.Subramaniam of the second defendant who had the authority to represent, had made it clear to the plaintiffs that the consent of the Directors of the second defendant was taken prior to the execution of the memorandum of settlement, and also informed that the Directors had in turn secured the consent of the first defendant, and thus the memorandum of settlement having been validly executed, the contention of the defendants that there was lack of knowledge and lack of authority in the matter of execution of the memorandum of settlement has to be rejected; that the said memorandum of cancellation was executed by a Senior Manager for and on behalf of the second defendant, who was the agent of the first defendant; that the disputes as to the cancellation of the contracts cannot be referred to arbitration, as contended by the petitioners' side; that the rules and bye-laws of Liverpool Cotton Association Ltd have not been made applicable to the contracts; that the cancellation of the contracts was by a subsequent memorandum of settlement which contained no provision for arbitration and which was not made subject to any arbitration to the Liverpool Cotton Association; that the questions as to whether the memorandum of settlement was binding or not on the parties and whether the Senior Manager Mr.Subramaniam had any authority to enter into the settlement were all to be necessarily decided by the Civil Court at the time of trial; that it was a matter of evidence and proof at the trial; that the petitioners were not entitled to and they were not justified in seeking any decision on those issues before trial; that after memorandum of cancellation was entered into between the parties, now the petitioners cannot be permitted to say that there was collusion with ex-employee of the second

defendant; that the alleged resignation of Mr.Subramaniam on 8.6.98 could not affect a valid settlement already entered into between the parties, even on 29.5.98 and that too after consultation and after securing the consent of both the defendants; that since the cancellation was by mutual consent, after consultation with both the petitioners, the defendants are now making an attempt to set aside the memorandum of settlement, cancelling the contracts by putting forth false allegations; that if they desired to do so, they should take a separate proceedings which they had not done, and the same cannot be an issue for arbitration, and thus the memorandum of settlement was separate and subsequent agreement without any provision for arbitration therein, and if the settlement was to be questioned by the defendants, the civil court was the only forum which could decide those issues; and that those disputes cannot be decided by arbitration proceedings. Added further the learned Senior Counsel that S.45 of the Act is not applicable to the present facts of the case, in view of the proviso to the said Section and in view of the fact that the contracts between the parties have already been cancelled by way of a valid memorandum of cancellation; that in view of all the above, the lower courts were perfectly correct in dismissing the applications for stay

and granting interim injunction in favour of the respondents plaintiffs, and hence the orders of the lower courts have to be sustained.

5. After careful consideration of the rival submissions, and scrutiny of the available materials on hand, the court is of the view that these revisions are devoid of merits. All the said four suits were filed by the respondents-plaintiffs seeking for declaration that the memorandum of settlement between the plaintiffs and the second defendant in respect of their contracts were valid and binding on the defendants, and the earlier contracts entered into between them did not subsist, and for consequential permanent injunction. At the time of filing of the above four suits, the said four interlocutory applications were filed by the respondents/plaintiffs seeking temporary injunction to restrain the petitioners/defendants from treating the said contracts as subsisting or making or enforcing any claim thereunder pending the disposal of the suits. On enquiry all these four applications were allowed and the resultant civil miscellaneous appeals preferred before the first appellate forum were also dismissed. The said four interlocutory applications were filed by the petitioners-defendants as stated supra, seeking to refer the disputes between the parties to Liverpool Cotton Association Ltd for arbitration and stay all further proceedings in the suits pending resolution of the disputes by arbitration. On contest, all those applications were dismissed, and the appeals preferred therefrom by the defendants were also

dismissed.

6. Admittedly, the petitioners company, a part of the Sakthi Group textile Division, in order to meet the cotton requirement of their mills, had negotiations with the Senior Manager of the second defendant company by name Mr.Subramaniam for supply of West African Cotton. Following an offer by the said Senior Manager representing the principal, an acceptance was made and contracts were entered into between the plaintiffs and the second defendant. According to the plaintiffs, before the contracts could be performed, they desired to settle the contracts in view of the crisis in the textile scenario, and the same was informed to the said Senior Manager of the second defendant, and with the consent of the first defendant and the concurrence of the Directors of the second defendant, the said Senior Manager having authority entered into a memorandum of settlement wherein all the earlier contracts were cancelled, and hence in view of the cancellation of the earlier contracts by the said memorandum of cancellation, the earlier contracts entered into between the parties seized to exist, and the defendants could not enforce the terms and conditions therein, and in view of the cancellation of the earlier contracts and in the absence of any arbitration clause in the memorandum of cancellation, the disputes between the parties could not be referred to the arbitration proceedings. The contention put forth by the petitioners/defendants seeking direction of the court to refer the matter to arbitration and to stay all further proceedings of the suits, is that the original contracts had a clause wherein it was specifically agreed that the disputes between the parties should be referred to arbitration; that the alleged memorandum of settlement has to be treated as a part of and one arising out of the earlier contracts between the parties, and hence it is immaterial that the memorandum did not contain any clause in that regard, and apart from that the said memorandum of cancellation would not be binding on the defendants, since there was thorough lack of knowledge of the same, and the same was executed by Mr. Subramaniam who had no authority to do so, and who has also subsequently resigned from the job, and hence it would not be binding; that in view of the provisions of the Arbitration Act, the disputes have got to be necessarily referred to the arbitration proceedings; that the defendants have already referred the matter to arbitration; that an award was passed in favour of the plaintiffs; and that the same was also challenged before the Tribunal wherein the award passed by the arbitrator was set aside, and an award in favour of the defendants has been passed, and if the plaintiffs were aggrieved by the same, they should have taken appropriate steps to set aside the award, and not by way of filing the suits and getting an order of injunction like this.

7. It is not disputed that the original contracts enterred into between the parties contained an arbitration

clause, according to which, any dispute arising between the parties was to be decided by the Liverpool Cotton Association Ltd, having its registered office in England. Relying on S.45 of Arbitration and Conciliation Act, 1996 (Act 34/96), the learned counsel for the petitioners would stress that so long as the arbitration agreement was valid and the disputes raised in the suits were covered by the arbitration clause, the court should have referred the parties to the arbitration. Relying on the proviso to the said Section, the learned counsel for the respondents would submit that though the original contracts contained an arbitration clause, the subsequent memorandum of cancellation did not contain any such clause, and hence the earlier contracts containing the arbitration clause is not valid and also incapable of being performed. It would be more appropriate and advantageous to reproduce S.45 of the Arbitration and Conciliation Act, 1996, which runs thus: "45. Power of judicial authority to refer parties to arbitration:- Not withstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (V of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed" From the very reading of the provision it would be clear that the judicial authority when seized of an action in the matter in respect of which the parties have made an agreement to refer to in Section 44, shall, at the request of the one of the parties or any person claiming through or under him refer the parties to arbitration. Since it is not in dispute that the original contracts between the parties contained an arbitration clause to refer the dispute that arose between the parties to arbitration. In the instant case, as contended by the defendants' side, in order to decide the dispute, the court below might have referred the parties to the arbitration, but the same was possible provided the original contract containing an arbitration clause was in force and in subsistence.

8. It is pertinent to note that in the instant case, the case of the respondents/plaintiffs is that a memorandum of cancellation was entered into between the parties, by which all the original contracts stood cancelled, and thus it would be very difficult to appreciate or accept the contentions of the petitioners' side as put forth above. It is not disputed by the petitioners' side that the second defendant was acting as agent of the first defendant; and that the said Subramaniam who executed the said memorandum of cancellation, was a Senior Manager of the second defendant, and he could well represent the second defendant at the time of the execution of the document. It is pertinent to note that the said Subramaniam has resigned his job only subsequent to the execution of the said memorandum

of cancellation. The contention of the petitioners' side that there was lack of knowledge on its part as to the cancellation of the earlier contracts and the said Senior Manager Subramaniam did not have authority, though he represented during the relevant time to execute such a memorandum of cancellation, cannot be accepted. It is true that the provision under S.45 to refer the parties to arbitration is mandatory. But, this mandatory provision cannot be applied to those contracts, if they are null and void, inoperative or incapable of being performed. The case of the plaintiffs in the instant case is that the contracts between the parties were put an end to by a memorandum of cancellation, and thus it has become inoperative and incapable of being performed. At this juncture, the learned counsel for the petitioners would urge that the question as to the validity or otherwise of the memorandum of cancellation of the earlier contracts could also be well decided in the arbitration proceedings, and hence that cannot be the reason for the Civil Court to take up the matter and try the same. The Bombay High Court had an occasion to consider the question whether a party could invoke the arbitration clause contained in the original contract, when there is no arbitration clause in the subsequent M.O.U. putting an end to the original contract, in a case reported in AIR 1997 BOMBAY 337 (LLOYDS STEEL INDUSTRIES LIMITED V. OIL & NATURAL GAS CORPORATION LTD.). Following the decisions of the Apex Court rendered in 1) 1995 SUPP (3) SCC 324; 2) 1994 SUPP (3) SCC 126; 3) AIR 1974 SC 15 8; 4) AIR 1959 SC 1362 and 5) (1942) AC 356, the Bombay High Court has held in the decision cited supra, thus: "Arbitration and Conciliation Act (1996). Ss.11, 16-Contract with arbitration clause Applicants' bills involving huge amount withheld for about 4-1/2 years Applicant suffering huge losses and was under grave economic duress Applicant agreeing to enter into MoU whereby claim was fully and finally settled and applicant accepting payment Dispute about claim for interest for delayed payments Held MoU had put an end to the original contract and the applicant could not invoke arbitration clause contained in it Question whether MoU was void or not on ground of economic duress and whether there was unjust enrichment could not be decided in these proceedings.

11. Further, the question which would be required to be decided is whether the Agreement referring the matter to the Arbitrator is in existence or not. It has been contended by the Applicant that the aforesaid question is required to be decided by arbitral Tribunal under Section 16 of the Arbitration Act. To this contention it has been pointed out that, before referring the matter for arbitration, the Court is required to decide whether there is any Arbitration Agreement subsisting or existing between the parties. If there is no existing arbitration agreement, then there is no question of referring the matter for arbitration.

12. It has been submitted that similar question is concluded by the Supreme Court and that this Court has to decide whether arbitration agreement is in existence or not before referring the matter for arbitration. If the arbitration agreement is not in existence, there is no question of referring the matter to the arbitral Tribunal. Reference would be without jurisdiction. Friday, 11th July, 1997.

13. In the case of Damodar Valley Corporation v. K.K.Kar, reoported in (1974) 1 SCC 141:(AIR 1974 SC 158), the Supreme Court considered the situation when arbitration clause in the contract would survive and cases where arbitration clause would perish with a new contract. The Court held as under (at p.161 of AIR):

"As the contract is an outcome of the agreement between the parties it is equally open to the parties thereto to agree to bring it to an end or to treat it as if it never existed. It may also be open to the parties to terminate the previous contract and substitute in its place a new contract or alter the original contract in such a way that it cannot subsist. In all these cases, since the entire contract is put an end to, the arbitration clause, which is a part of it, also perishes along with it. Section 62 of the Contract Act incorporates this principle when it provides that if the parties to a contract agree to substitute a new contract or to rescind or alter it, the original contract need not be performed. Where, therefore, the dispute between the parties is that the contract itself does not subsist either as a result of its being substituted by a new contract or by rescission or alteration, that dispute cannot be referred to the arbitration as the arbitration clause itself would peris h if the averment is found to be valid. As the very jurisdiction of the arbitrator is dependent upon the existence of the arbitration clause under which he is appointed, the parties have no right to invoke a clause which perishes with the contract. Thereafter, the Court in paragraph 9 referred to the principles stated in Heyman's case ((1942) AC 356). Lord Macmillan pointed out at page 370 as under :

"If it appears that the dispute is whether there has ever been a binding contract between the parties, such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has ever been a contract at all, there has never been as part of it an agreement to arbitrate. The greater includes the less. Further, a claim to set aside a contract on such grounds as fraud, duress or essential error cannot be the subject matter of a reference under an arbitration clause in the contract sought to be set aside. Again, an admittedly binding contract containing a general arbitration clause may stipulate that in certain events the contract shall come to an end. If a question arises whether the contract has for any such reason come

to an end, I can see no reason why the arbitrator should not decide that question. It is clear, too, that the parties to a contract may agree to bring it to an end to all intents and purposes and to treat it as if it had never existed. In such a case, if there be an arbitration clause in the contract, it perishes with the contract. If the parties substitute a new contract for the contract which they have abrogated, the arbitration clause in the abrogated contract cannot be invoked for the determination of questions under the new agreement. All this is more or less elementary." (Emphasis supplied) Further, the Court referred to the principles laid down by the Supreme Court in the case of Union of India v. Kishorilal Gupta, AIR 1959 SC 1362, for deciding whether contract perishes or subsists which are as under (at p.1370 of AIR):

"(1) An arbitration clause is a collateral terms of a contract as distinguished from its substantive terms; but none-the-less it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract; (3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (5) in the former case, if the original contract has no legal existence, the arbitrationclause also cannot operate, for along with the original contract, it is also void; in the altter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (6) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes."

14. In the aforesaid decision in the case of Kishorilal (AIR 1959 SC 1362), the Court interpreted the clause in the second contract which provided as under: "The contract stands finally determined and no party will have any further claim against the other." The Supreme Court held that, in view of the aforesaid new contract, the arbitration clause contained in the old contract perished.

15. The principle of law that, where parties put an end to a contract as if it had never subsisted and substituted it with a new contract governing the rights and obligations of the

parties thereunder, the arbitration clause also perishes along with it, was accepted as a correct principle in the said case. In the case of Damodhar Valley (AIR 1974 SC 158), the Court was not concerned with the question whether there had been novation, rescission or substitution of the contract, but the question was whether there had been a settlement of all claims arising in connection with a contract which postulates the existence of a contract. In that case, the court observed that accord and satisfaction does not put an end to the arbitration clause. Hence, the Court held that, in the circumstances, the question whether the termination was valid or not and whether damages are recoverable for such wrongful termination does not affect the arbitration clause or the right of the Respondent to invoke it for appointment of Arbitrator.

16. From the aforesaid discussion it is clear that the parties can put an end to a contract as if it had never subsisted and can substitute it with a new contract governing their rights and obligations. In such a case, the arbitration clause in the original contract perishes. In such a case, the arbitration clause in the substituted or abrogated contract cannot be invoked for the determination of the questions under the new agreement for a claim to set aside a contract on the grounds such as fraud, duress or coercion. Once the contract is substituted by a new contract, the old contract does not subsist. In a contract which is substituted or abrogated, the parties have no right to invoke the clause which has perished with the contract. In such a case, there is no question of appointing arbitrator as the very jurisdiction of the Arbitrator is dependent upon the existence of the arbitrator clause. "

9. In view of the decisions of the Hon'ble Apex Court, which were followed by the Bombay High Court in the decision cited supra, it is crystal clear that if there was no existing arbitration agreement between the parties, there was no question of referring the matter for arbitration; that if the entire contract between the parties was put an end to, the arbitration clause which was a part of it, also perished along with it; that if the earlier contract containing an arbitration clause has been abrogated, the party should not be permitted to take the benefit of the arbitration clause in the abrogated contract for determining the question under the new agreement; and that the claim of the defendants to set aside the memorandum of cancellation on the ground of any of the invalidating factors c annot be referred to as a subject matter of reference to the arbitration proceedings and in view of an arbitration clause which has already been put an end to.

10. In view of the available materials, it could be well stated that the plaintiffs/respondents had a prima facie case that the contracts entered into between the parties were

terminated by a subsequent memorandum of settlement entered into between them. The question whether the said memorandum of settlement is true, genuine and valid, as contended by the plaintiffs' side, or whether it was tainted by any one of the invalidating factors put forth by the defendants' side could be decided only by evidence at the time of the trial. At this juncture, it remains to be stated that even for that purpose, in view of the aforestated decisions, the matter has got to be necessarily tried and decided by a civil court and cannot at all be referred to the arbitration. The learned District Judge was not correct in stating that the memorandum of settlement was only a continuation of the earlier contracts between the parties, and hence she was not inclined to accept the contention put forth by the plaintiffs' side that the question as to the validity and binding nature of the memorandum of settlement cannot be treated as the dispute arising out of the earlier contracts, which contained provision of arbitration so as to refer the said question for arbitration as per Liverpool Cotton Association Rules. If the subsequent memorandum of settlement is found to be true and valid, the earlier contracts between the parties would come to an end by the execution of the memorandum of settlement itself and the same would perish the earlier contracts.

11. From the available materials and submissions made by the counsel for respective sides, it could be seen that the arbitration award as evidenced by Ex.A12 was made after the order of interim injunction was passed. The court is of the view that the said award is of no legal consequence for two reasons. The civil court was well vested with the jurisdiction to deal with the matter under the facts and circumstances of the case, and thus the subject matter could not be referred to for dissolution of the disputes by an arbitrator. That apart, the said award under Ex.A12 was passed by the arbitrator when the interim injunction was in force. The contention of the petitioners' side that though the memorandum of settlement did not contain any provision for arbitration, the truth and validity of the said memorandum of settlement could also be decided by the arbitrator or the arbitral tribunal where the arbitration award was challenged cannot be countenanced, since it was a question which, in view of the decisions cited supra, has to be exclusively decided by a civil court and not under arbitral proceedings. The District Court was not correct in accepting the award passed by the appellate authority, as an additional evidence in the civil miscellaneous appeal. The court is able to see suffice force in the objection that was raised by the plaintiffs' side for the receipt of the same as an additional evidence. Since the award passed by the appellate authority was only in continuation of the original award, the application for receipt of the award by the appellate authority should have been rejected, in view of the fact that the original award was passed in the arbitral proceedings, at a time where an interim injunction was in force.

12. For the foregoing reasons, the court is of the firm view that if a temporary injunction as sought for by the respondents/plaintiffs is not granted, and if the petitioners/defendants were allowed to proceed to enforce their claims based on the earlier contracts, pending the suits, much prejudice would be caused to the respondents/ plaintiffs. In view of the facts and circumstances of the case and in view of the decisions cited supra, the trial court has to necessarily proceed with the suits and decide the controversy between the parties regarding the subsistence of the earlier contracts and as to the truth, genuineness and validity of the memorandum of cancellation, relied on by the respondents/plaintiffs, and hence the stay of the trial of the proceedings should not be granted. Thus, the orders of the lower courts granting interim injunction in favour of the plaintiffs in the interlocutory applications pending the suits and dismissing the applications filed by the defendants to refer the dispute between the parties to Liverpool Cotton Association Ltd for arbitration and to stay all further proceedings in the suits pending resolution of the disputes by arbitration have to be sustained. Therefore, all these civil revision petitions are liable to be dismissed as devoid of merits whatsoever.

13. In the result, all the eight civil revision petitions are dismissed, confirming the orders of the lower courts. There shall be no order as to the costs. Consequently, connected CMPs are also dismissed.

Index: Yes/No 14-2-2002
Sd/-
Asst. Registrar
//true copy//

Sub Asst. Registrar

M.CHOCKALINGAM, J.

nsv/
To:
1.The I Additional District Judge-
cum-Chief Judicial Magistrate,
Coimbatore.
2.The II Additional Subordinate Judge,
Coimbatore.

Pre delivery order in
C.R.P.Nos.529,530,965,

1007,1343,1535,2371 &
2375 of 2001 and
CMP Nos.7277,12667 &
12686 of 2001

Dt: -2-2002